



To: Robert Desiderio
Hearing Officer

From: Brian Hamer
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Subject: Submission of Proposed Revisions to the MTC Model Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States under Public Law 86-272

Date: June 17, 2020

The Commission hereby submits the proposed revision of the Statement of Information Concerning Practices of the Multistate Tax Commission and Signatory States Under P.L. 86-272. The proposed revision and a version marked to show the changes to the current Statement are attached to this memorandum.

Background on the Proposed Revisions

On November 7, 2018, the Uniformity Committee initiated a project to update the Statement of Information, last revised in 2001, and formed a Work Group for this purpose. The Work Group, which consists of volunteers from 12 states, met by telephone 23 times between February 2019 and February 2020.¹ The Work Group provided the Committee with regular updates on its progress and received input from the Committee.

On April 22, 2020, the Work Group submitted to the Committee its final proposed revisions to the Statement. The Uniformity Committee heard public comment and then voted to recommend the proposed revisions to the Commission's Executive Committee. On April 23,

¹ Information on these meetings and archived materials considered by the Work Group are available on the MTC website here: <http://www.mtc.gov/Uniformity/Project-Teams/P-L-86-272-Statement-of-Information-Work-Group>.

2020, the Executive Committee approved the proposed revisions for public hearing under the Commission's Bylaw 7.

Scope of the Project

The scope of this project was limited: to consider how Public Law 86-272 applies to modern business activities. In other words, the Work Group's task was statutory interpretation, not policy making. Furthermore, because P.L. 86-272 is a federal statute and Congress did not delegate authority to issue regulatory or other interpretive guidance to the states, the Statement serves to inform taxpayers the position that states will take when applying the statute to particular activities.

States of course may adopt limitations on business income taxation that extend beyond the limitations contained in P.L. 86-272. In particular, some states have enacted legislation shielding from taxation those businesses with activity or property that falls below certain designated thresholds. The Commission adopted such a model for recommendation to the states in 2002—the MTC Factor Presence Nexus Standard for Business Activity Taxes. There is no conflict between the MTC Factor Presence Standard and the proposed revisions to the Statement of Information. The Commission continues to urge states to consider adoption of the Factor Presence Standard.

The Federal Statute

Enacted in 1959 to limit state taxing authority, the language of P.L. 86-272 cannot be elegantly summarized. It provides in key part that “[n]o state or political subdivision thereof” may impose a net income tax “on income derived within such State by any person from interstate commerce if the only business activities within such state by or on behalf of such person . . . are the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property that are sent outside the state for approval or rejection and, if approved, are filled by shipment or delivery from a point outside the State. . . .” The statute also provides that certain specified in-state activities conducted by independent contractors “on behalf of” a person

will not defeat that person's immunity from tax. The full text of P.L. 86-272 is attached to the proposed revision of the Statement of Information.

In 1959, when P.L. 86-272 was enacted, Congressional proponents described the legislation as "a temporary solution" pending a deeper review of state taxation.² Yet during the following six decades, the statute has never been revised or updated. Because the language of the statute is subject to conflicting interpretations, and because no regulatory process that might resolve these conflicts has been established, the application of the statute has been subject to many legal disputes.³

This memorandum summarizes the statute's key legislative history below, beginning on page 9.

Need for State Guidance

The bare text of P.L. 86-272 fails to provide the kind of specific guidance needed by many interstate businesses to understand if they are subject to state income tax obligations. And simply leaving this uncertainty for state courts to resolve is unsatisfactory, since any judicial interpretation (unless it is by the U.S. Supreme Court) may be of limited application in other states, and since the ability of any court to address issues of interpretation is often constrained by narrowness of the facts at issue in particular litigation. Furthermore, court rulings are generally retrospective, meaning that taxpayers cannot obtain the benefit of the specific guidance contained in a ruling when determining whether to file tax returns for past years to which that ruling may apply.

To address the uncertainties arising from the statute and to provide needed guidance to taxpayers, the MTC in 1986 issued the original version of the Statement of Information. The

² Senate Rpt. No. 658, 86th Cong., 1st Sess. *See also* Conference Rpt. No. 1103, 86th Cong., 1st Sess. (envisioning both additional study and the enactment of further legislation).

³ The Willis Commission, which was tasked by Congress following the enactment of P.L. 86-272 to study state taxation and evaluate the statute, engaged in the additional study and issued a four-volume report, but no further legislation resulted from its work.

Statement described how signatory states interpreted the statute and how they would apply it to various business activities. In Article IV, the Statement specifically listed: (1) those in-state activities that are protected by P.L. 86-272, meaning that their exercise by a business would not subject the business to taxation by states where its customers are located, and (2) various in-state activities that are not protected by P.L. 86-272, meaning that their exercise by a business would defeat the business's tax immunity otherwise provided by the statute. Since 1986, the Commission has revised the Statement on three occasions, as new issues arose and caselaw continued to develop.

The Work Group's Consensus on Proposed Revisions

All Work Group members agreed that, when considering whether an activity conducted via the Internet is protected by P.L. 86-272, the first question to be asked is whether the activity constitutes solicitation of orders for tangible personal property. If the answer is yes, then the activity is protected. This question received little attention because the statute clearly protects solicitation, regardless of how solicitation is accomplished, and the meaning of solicitation is addressed by the current version of the Statement of Information.

The Work Group focused on a second question: if business activities conducted by an Internet seller extend beyond solicitation, are they "business activities within [the taxing] state"? If the answer to this question is yes, then the activities are not protected by the statute. After much discussion, the Work Group adopted a framework to answer this question in the case of activities conducted via the Internet, and language describing that framework was inserted into the proposed revision. The agreed upon language reads as follows:

As a general rule, when a business interacts with a customer via the business's website or app, the business engages in a business activity within the customer's state. However, for purposes of this Statement, when a business presents static text or photos on its website, that presentation does not in itself constitute a business activity within those states where the business's customers are located.

To provide further guidance, the Work Group added to the proposed revision 11 factual scenarios and indicated in each case whether the described business activity was or was not protected by the statute, together with a brief explanation. Below are the 11 scenarios (with the

topic noted). In each scenario, unless otherwise indicated, the business operates a website offering for sale only items of tangible personal property and customer orders are approved or rejected, and the products are shipped, from a location outside of the customer's state. Also, the business has no contacts with the customer's state other than what is described.

- [Basic website] The business offers for sale only items of tangible personal property on its website. The website enables customers to search for items, read product descriptions, select items for purchase, choose among delivery options, and pay for the items. The business does not engage in any in-state business activities that are not described in this example, such as the activities described [in various examples below]. This business activity does not defeat the business's P.L. 86-272 immunity because the business engages exclusively in in-state activities that either constitute solicitation of orders for sales of tangible personal property or are entirely ancillary to solicitation.
- [Posting FAQs] The business provides post-sale assistance to in-state customers by posting a list of static FAQs with answers on the business's website. This posting of the static FAQs does not defeat the business's P.L. 86-272 immunity because it does not constitute a business activity within the customers' state.
- [Post-sale assistance provided via electronic chat or website email] The business regularly provides post-sale assistance to in-state customers via either electronic chat or email that customers initiate by clicking on an icon on the business's website. For example, the business regularly advises customers on how to use products after they have been delivered. This in-state business activity defeats the business's P.L. 86-272 immunity in states where the customers are located because it takes place within customers' states and neither constitutes, nor is entirely ancillary to, the in-state solicitation or orders for sales of tangible personal property.
- [Credit card solicitations] The business solicits and receives on-line applications for its branded credit card via its website. The issued cards will generate interest income and fees for the business. This business activity defeats the business's P.L. 86-272 immunity in states where the customers are located because it takes place within customers' states and neither constitutes, nor is entirely ancillary to, the in-state solicitation or orders for sales of tangible personal property.
- [Employment applications] A business's website invites viewers in a customer's state to apply for non-sales positions with the business. The website enables viewers to fill out and submit an electronic application, as well as to upload a cover letter and resume. This in-state business activity defeats the business's P.L. 86-272 immunity in the customer's state because it does not constitute, and is not entirely ancillary to, the in-state solicitation of orders for sales of tangible personal property.
- [Cookies used for purposes ancillary to solicitation] A business places Internet "cookies" onto the computers or other electronic devices of in-state customers. The cookies gather

customer information that is only used for purposes ancillary to the solicitation of orders for TPP, such as to remember items that customers have placed in the their shopping cart during a current web session, to store personal information customers have provided to avoid the need to re-input the information when they return to the seller's website, and to remind customers what products they have considered during previous sessions.

Although this is an in-state business activity, it does not defeat the business's P.L. 86-272 immunity because it is entirely ancillary to the solicitation of orders for sales of tangible personal property.

- [Cookies used for purposes other than solicitation] A business places Internet "cookies" onto the computers or other electronic devices of in-state customers. These cookies gather customer search information that will be used to adjust production schedules and inventory amounts, develop new products, or identify new items to offer for sale. This business activity defeats the business's P.L. 86-272 immunity in states where the customers are located because it takes place within customers' states and neither constitutes, nor is entirely ancillary to, the in-state solicitation or orders for sales of tangible personal property.
- [Product fixes and upgrades] The business remotely fixes or upgrades products previously purchased by its in-state customers by transmitting code or other electronic instructions to those products via the Internet. This in-state business activity defeats the business's P.L. 86-272 immunity because it does not constitute, and is not entirely ancillary to, the in-state solicitation of orders for sales of tangible personal property.
- [Warranty plans] The business offers and sells extended warranty plans via its website to in-state customers who purchase the business's products. Selling, or offering to sell, a service that is not entirely ancillary to the solicitation of orders for sales of tangible personal property, such as an extended warranty plan, defeats the business's P.L. 86-272 immunity—*see* Article I [of the Statement].
- [Marketplace facilitators] A business contracts with a marketplace facilitator that facilitates the sale of the business's products on the facilitator's on-line marketplace. The marketplace facilitator maintains inventory, including some of the business's products, at fulfillment centers in various states where the business's customers are located. This maintenance of the business's products defeats the business's P.L. 86-272 immunity in those states where the fulfillment centers are located.
- [Streaming] A business contracts with in-state customers to stream videos and music to electronic devices for a charge. This in-state business activity defeats the business's P.L. 86-272 immunity because streaming does not constitute the sale of tangible personal property for purposes of P.L. 86-272—*see* Article I [of the Statement].

Based on Work Group discussions, individual members of the Work Group sometimes used different reasoning to reach their conclusions as to particular issues. Two ideas, however, featured prominently in those discussions. First, although members recognized that P.L. 86-272

was not interpreted in *South Dakota v. Wayfair*,⁴ they found relevant the Supreme Court’s observation in that case that an Internet seller “may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term.”⁵ Second, some members found it relevant that when a seller and a customer interact via the seller’s website, the website inserts software into the customer’s computer to facilitate the interaction.⁶ These ideas, while recognized as important by Work Group members, were not always the basis for the Work Group’s conclusions. For example, the Work Group concluded that music and video streaming are not protected by the statute simply because streaming does not constitute the sale of tangible personal property.

Members debated extensively whether the static, non-interactive presentations of text or photos on a website, and also activities conducted by telephone, constitute “activities within the state” for purposes of the statute. But in the end, they agreed by large margins that (1) static presentations do not constitute activities within the state and (2) it was unnecessary to address the issue of telephone calls, which had not previously been addressed in the Statement of Information.

In addition to revisions that address business activities conducted via the Internet, the Work Group recommended, without dissent, four additional substantive revisions to the Statement of Information:

⁴ 138 S. Ct. 2080 (2018).

⁵ *Id.* at 2095. The Work Group agreed to reference *Wayfair* in the Introduction to the proposed revision. The Introduction states that the Supreme Court’s analysis “as to virtual contacts” is “relevant to the question of whether a seller is engaged in business activities in states where its customers are located for purposes of the statute.”

⁶ There was wide agreement among Work Group members that P.L. 86-272 does not require a human being to engage in non-solicitation activities within the taxing state to defeat the seller’s immunity—if, for example, a seller sends a robot or a drone into the state, that would be sufficient. Transmission of software to facilitate interaction between the parties has a similar effect. *See, e.g.*, Expert Report prepared by Ashkan Soltani to Ohio Attorney General’s Office, p. 20, dated Sep. 25, 2014 (“When a user visits a website . . . , the website transmits code and images to the user’s computer via the user’s current internet connection”). The Soltani report and other resources can be found on the MTC’s website.

The Work Group’s thinking on this topic is perhaps most clearly reflected in the proposed revision’s factual scenario where an Internet seller remotely fixes or upgrades products it has previously sold by transmitting code or other electronic instructions to those products. The proposed revision states that this activity removes the business’s P.L. 86-272 immunity.

- Adding to the Statement’s list of unprotected activities within a state the “activities performed by an employee who telecommutes on a regular basis” (unless the activities are limited to solicitation of orders for tangible personal property). This addition responds to the substantial growth of telecommuting since the Statement was last revised two decades ago.⁷
- Adding to Article V (Independent Contractors) an affirmative statement that an independent contractor’s performance of unprotected activities on behalf of a seller, such as performing warranty work or accepting returns of the seller’s products, removes the seller’s statutory protection. This addition to the Statement follows directly from the statute’s language and is supported by case law.⁸
- Revising Article VII.A (Application of Statement to Foreign Commerce). Article VII.A observes that P.L. 86-272 applies explicitly only to “interstate commerce” and not to foreign commerce.⁹ The proposed revision to this section of the Statement removes language requiring the states to apply P.L. 86-272 to foreign commerce, while permitting a state to do so—which appears to be the general practice. The revision makes clear that if P.L. 86-272 is applied to foreign commerce, it must be applied consistently.
- Deleting Article VII.E (Application of the Joyce rule). The current version of the Statement endorses the so-called Joyce rule,¹⁰ as opposed to the Finnigan rule¹¹ of combined filing. The Work Group concluded that it was no longer appropriate for the Statement to recommend Joyce, since the majority of combined reporting states have now adopted Finnigan. Instead, the proposed revision of the Statement takes no position.

Finally, the proposed revision of the Statement adopts the concept of a “Supporting State.” Unlike prior versions of the Statement, the proposed revision contemplates that states will not need to agree to sign the document to indicate their approval. Instead, adopting the Statement

⁷ The Work Group’s deliberations ended before the coronavirus pandemic spiked. Many states are likely to decide that temporary work at home that is necessitated by the pandemic does not defeat a business’s P.L. 86-272 immunity.

⁸ See, e.g., *Ann Sacks Tile and Stone, Inc. v. Dep’t of Revenue*, 20 Ore. Tax Ct. 337 (2011) (warranty work performed by in-state independent contractors on behalf of an out-of-state seller/manufacturer); *Cheng Shin Rubber USA, Inc. v. Dep’t of Revenue*, TC-MD 156268D (Ore. Tax Ct. 2017) (out-of-state tire distributor reimbursed in-state retailer for replacement tires provided to purchasers under the distributor’s warranty); and *Santa Fe Natural Tobacco Co. v. Dep’t of Revenue*, TC-MD 170251G (Ore. Tax Ct. 2019) (wholesalers accepted returns on behalf of an out-of-state manufacturer under a distributor incentive program).

⁹ See *Border Pipe Line Co. v. Fed. Power Comm’n*, 171 F.2d 149 (D.C. Cir 1948)(Congress may choose to protect or regulate interstate but not foreign commerce).

¹⁰ Under the Joyce rule, which is named after a California Franchise Tax Board decision, members of a unitary group are regarded as separate taxpayers for purposes of determining whether they are subject to a state’s tax.

¹¹ Under the Finnigan rule, which is named after another Franchise Tax Board decision (see FN10), each member of a unitary group is subject to a state’s tax if the unitary group is subject to tax.

by legislation, regulation, or other administrative action (or by some other express means) will indicate approval. States may also indicate support for individual sections of the Statement rather than the entire Statement. The proposed revision of the Statement also adds a table of contents, updates the Introduction, and makes numerous non-substantive changes to clarify and modernize language.

The History of P.L. 86-272

The statute's history is relevant when construing its text, which in certain key respects is less than clear.¹² Congress enacted P.L. 86-272 in response to a series of court decisions that addressed the extent to which the Constitution permits states to tax interstate commerce, an issue that eventually came before the U.S. Supreme Court. There, the Justices supporting the states' ability to tax interstate commerce prevailed over a vocal dissent, signaling a significant shift in the Court's thinking about the issue.

The Supreme Court issued its opinion on February 24, 1959 in *Northwestern States Portland Cement Co. v. Minnesota*,¹³ which involved two consolidated cases. In the first case, Minnesota assessed tax on an Iowa manufacturer that sold cement to customers in Minnesota. All orders were approved in Iowa and shipped from the company's plant there. The business employed four salespersons and a secretary in Minnesota and leased a small office there. In the second case, Georgia assessed tax on a Delaware corporation that sold valves and pipe fittings to wholesalers and jobbers in Georgia. The company's principle office and plant were in Birmingham, Alabama. Orders were approved in, and shipped from, Birmingham. The company employed one salesperson and a secretary in Georgia and maintained a small office in Atlanta for their use.

¹² Essential terms are not defined in the statute. In particular, the failure to define "solicitation" left the scope of the protection inherently ambiguous (a problem that the U.S. Supreme Court eventually addressed in *Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co.*, 505 U.S. 214 (1992), but did not fully resolve). The failure to define the phrase "business activities within such State" raises questions that were at the very center of the Work Group's discussions. The failure to define "tangible personal property" is perhaps understandable, given the common understanding of that term in 1959, but over time the term's meaning has become much less clear.

¹³ 358 U.S. 450 (1959).

The Court began its opinion by characterizing the question before it: whether a state may tax net income earned from “*business activities within the taxing State* when those activities are exclusively in furtherance of interstate commerce”¹⁴ Noting that in both cases the income subject to tax was fairly apportioned (based on the company’s activities in the taxing state), the Court explained that it was entirely appropriate for the state to impose tax, regardless of the fact that the activities were in interstate commerce. “It is axiomatic that the founders did not intend to immunize such commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the State,” the Court explained.¹⁵

Seven days after issuing its opinion in *Northwestern States*, the Supreme Court declined to hear an appeal of *Brown-Forman Distillery Corp. v. Collector of Revenue*, a case from Louisiana. And, two months later, the Court denied certiorari in *International Shoe Co. v. Fontenot*, another Louisiana case. These cases raised similar issues and, in both instances, the Louisiana Supreme Court held that the state could constitutionally impose its tax on the apportioned income of the out-of-state companies. In *Brown-Forman Distillers Corp.*, the company employed “missionary men” who called on wholesale dealers and occasionally accompanied wholesalers’ sales staff when they visited retailers in Louisiana. All orders received by the missionary men were approved in and shipped from Kentucky. Unlike the companies in *Northwestern States*, the distiller did not maintain an in-state office (and also did not have a warehouse or any inventory in Louisiana).¹⁶ In *International Shoe Co. v. Fontenot*, a manufacturer incorporated in Delaware had its offices, warehouses, “and all of its business outside of the State of Louisiana.” The company’s only Louisiana activity consisted of the solicitation of orders by 15 salespersons.¹⁷

Members of the business community reacted quickly and vigorously to *Northwestern States* and to the Supreme Court’s decision not to review the Louisiana cases, calling upon Congress to impose restrictions on the taxing authority of states. Congress responded promptly. Before the end of July, both the Senate Small Business Committee and the Senate Finance

¹⁴ Id. at 452 (1959) (emphasis added).

¹⁵ Id. at 461-62.

¹⁶ 101 So.2d 70 (La. 1958), *appeal dismissed and cert. denied*, 359 U.S. 28 (1959).

¹⁷ 107 So.2d 640 (La. 1958), *cert. denied*, 359 U.S. 984 (1959).

Committee held hearings.¹⁸ Less than 20 days after concluding its hearings, the Finance Committee reported out a bill. This bill, designated S. 2524, was promptly approved by the full Senate, slightly modified in conference committee, and then passed by both houses of Congress. It was signed by President Eisenhower on September 14, 1959 (whereupon it became P.L. 86-272)—less than seven months after the opinion in *Northwestern States* was issued.

What is clear from the floor debates and legislative reports leading to the passage of P.L. 86-272 (as well as the language of the statute itself) is that, in the wake of *Northwestern States*, Congress sought to ensure that solicitation of sales of tangible personal property by a business selling into a state would not cause that business to become subject to the state's income tax. The Senate Finance Committee report that accompanied S. 2524 expressed that *Northwestern States* “has created considerable concern and uncertainty” within the business community and that the Committee itself expressed concern that

businesses, particularly small- and medium-sized businesses, may be hesitant to develop new markets in some States by extending their solicitation activities to such States . . . *should mere solicitation of orders be regarded as a local activity, forming sufficient ‘nexus’ with the State.* . . (emphasis added).¹⁹

A report issued by the House Judiciary Committee made a similar point:

Although it may be argued that the Supreme Court has not yet decisively disposed of the precise question of whether solicitation alone is a sufficient activity for the imposition of a State income tax upon an out-of-state business, the very fact that this question is unresolved is perhaps the strongest argument for Congress to act at this time. Businessmen should not be forced to guess about their tax liability.²⁰

This focus on solicitation was neatly summarized by Rep. William Miller, one of the House-Senate conferees who advocated for the conference bill on the floor of the House. He stated that

¹⁸ According to Robert Roland, the collector of revenue for the state of Louisiana, while dozens of business representatives testified before the Finance Committee, only two states were allowed to do so. Robert Roland, “Public Law 86-272: Regulation or Raid,” 46 Va. L. Rev. 1172 (1960).

¹⁹ Senate Rpt. No. 658, 86th Cong. 1st Sess.

²⁰ House Rpt. No. 936, 86th Cong. 1st Sess.

the bill “is very narrow, indeed. It covers only the single and simple area where a corporation does nothing more within a State than solicit orders.”²¹

It is important to note that in the aftermath of *Northwestern States* Congress also considered four bills that would have expressly required a business to have physical presence before a state could tax the business’s income—but rejected them all. S.J. Res. 113 would have prohibited a state (or its political subdivisions) from imposing a tax on any business engaged in interstate commerce unless:

“ . . . such business has maintained a stock of goods, an office, warehouse, or other place of business in such State or has had an officer, agent, or representative who has maintained an office or other place of business in such State.”

Similarly, S. 2218 would have prohibited a state from imposing tax on a person “solely by reason of the solicitation of orders in the State” if the person “maintains no stock of goods, plant, office, warehouse, or other place of business within the State.” S. 2281 would have shielded sellers from taxation if they did not maintain “an office, warehouse, or other place of business in the State” and did not have “an officer, agent, or representative in the State who has an office or other place of business in the State.” And another bill, H.J. Res. 450, would have prevented any state from taxing a business unless “the business has maintained an office, salable inventory, warehouse, or other place of business in that State or has had an officer, agent, or representative who has maintained an office or other place of business in that State.”²²

Reactions to the Revisions

Although MTC staff encouraged taxpayer representatives to provide input at Work Group meetings, few did. There has been, however, some feedback outside of the work group process.

²¹ Cong. Rec., Sep. 2, 1959, p. 17771.

²² Congress rejected these alternatives, moreover, at a time when it was understood that businesses could have a meaningful presence in a state without physical presence. In the analogous realm of personal jurisdiction, it was settled law in 1959 that a business was not required to have physical presence in a state to be sued there. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (“if he be not present within the territory of the forum, he [must] have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’”); *McGee v. International Life Insurance*, 355 U.S. 220 (1957) (finding that the due process clause did not preclude a court from exercising jurisdiction in a state where the defendant had never been present).

Perhaps most significant is the argument that activities which are conducted via the Internet cannot constitute business activities “within” customers’ states because Internet sellers are not physically present in those states. P.L. 86-272, however, makes no express mention of physical presence (in contrast to the four other bills that Congress considered and ultimately rejected in 1959 which would have expressly required some sort of physical presence to trigger income tax obligations). And to construe the words that are in the statute to condition state taxation on a seller’s physical presence would violate the rule, repeatedly expressed by the Supreme Court, that state authority is not preempted unless there is a “clear and manifest” Congressional intent to do so.²³ In any event, even if courts were to hold that Congress effectively created a physical presence standard, this conclusion would hardly determine whether activities conducted via the Internet constituted “business activities within [the taxing] State.” After all, as the Supreme Court observed in *Wayfair*, “a company with a website accessible in South Dakota may be said to have a physical presence in the State via the customers’ computers.”²⁴

The Commission will supplement this general response to respond more fully to this argument or other arguments if they are put forward as part of the Public Hearing.

²³ *Dep’t of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 345 (1994); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). See also *Heublein, Inc. v. South Carolina Tax Comm’n*, 409 U.S. 275, 281-82 (1972) (“unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance”); *Matter of Disney Enterprises Inc. v. Tax Appeals Tribunal*, 888 N.E. 2d 1029, 1036 (2008) (as “the power to tax is such a traditional state power, . . . we will not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress’ language”).

²⁴ *Wayfair*, at 2095. If courts were to find that P.L. 86-272 requires physical presence to defeat a seller’s immunity, Internet sellers would also need to explain why functions performed by the software transmitted by a seller’s website to a customer’s computer does not constitute “business activities in [the customer’s] State.” See note 6 *supra* and related text.

**Statement of Information Concerning Practices of
Multistate Tax Commission and Signatory States
Under Public Law 86-272**

Originally adopted by the Multistate Tax Commission on July 11, 1986
Revised version adopted by the MTC Executive Committee on January 22, 1993
Second revision adopted by the Multistate Tax Commission on July 29, 1994
Third revision adopted by the Multistate Tax Commission on July 27, 2001
Fourth revision adopted by the Multistate Tax Commission on [, 2020]

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INTRODUCTION

In this Statement, “Supporting State” means a State that adopts or otherwise expressly indicates support for this Statement by legislation, regulation or other administrative action. Other states may adopt or otherwise indicate support for individual sections of this Statement.

This Statement addresses the application of Public Law 86-272, 15 U.S.C. §§381-384 (which is set forth in Addendum I). P.L. 86-272, which Congress adopted in 1959, prohibits a state from imposing a net income tax on the income of a person derived within the state from interstate commerce if the only business activities within the state conducted by or on behalf of the person consist of the solicitation of orders for sales of tangible personal property, provided that the orders are sent outside the state for acceptance or rejection, and, if accepted, are filled by shipment or delivery from a point outside the state.

In the decades since P.L. 86-272 was enacted, the way in which interstate business is conducted has changed significantly. Congress, however, has neither created a federal mechanism to provide administrative guidance to taxpayers nor has it updated the statute to indicate how it applies to new business activities. *See Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 223 (1992) (finding the statute’s minimum standard “to be somewhat less than entirely clear”). The contents of this Statement are intended to serve as general guidance to taxpayers and to provide notice as to how Supporting States will apply the statute.

This Statement is guided by the principle that sovereign authority of states to impose tax will not be preempted unless it is the “clear and manifest purpose of Congress” to do so. *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 345 (1994). *See also Heublein, Inc. v. South Carolina Tax Comm’n*, 409 U.S. 275, 281-82 (1972) (noting that Congress must convey “its purpose clearly” or “it will not be deemed to have significantly changed the Federal-State balance”).

The Supreme Court recently opined, in *South Dakota v. Wayfair, Inc.*, construing the Commerce Clause, that an Internet seller “may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term.” 138 S. Ct. 2080, 2095 (2018). Although the *Wayfair* Court was not interpreting P.L. 86-272, the Supporting States consider the Court’s analysis as to virtual contacts to be relevant to the question of whether a seller is engaged in business activities in states where its customers are located for purposes of the statute.

This Statement does not attempt to take into account limitations on the application of business income taxes other than P.L. 86-272, including those limitations that may be provided under state law. For example, the Multistate Tax Commission has adopted a model factor presence nexus statute and recommends that states adopt that statute to shield from taxation small businesses

or businesses that have minimal contacts with the state. *See* Factor Presence Nexus Standard for Business Activity Taxes, adopted by the Multistate Tax Commission on October 12, 2002 (which is set forth in Addendum II).

Finally, P.L. 86-272 not only affects the determination of whether a state into which tangible personal property is delivered (the “destination state”) may tax the income of the seller, but it also affects the determination of whether the state from which tangible personal property is shipped (the “origin state”) may subject the related receipts to that state’s throwback rule. The Supporting States intend to apply this Statement uniformly, irrespective of whether the destination state is determining whether it can tax the income of the seller, or whether the origin state, is determining whether the related receipts are subject to that state’s throwback rule.

I NATURE OF PROPERTY BEING SOLD

Only the solicitation to sell tangible personal property is afforded immunity under P.L. 86-272; therefore, the leasing, renting, licensing or other disposition of tangible personal property, or transactions involving intangible property, such as franchises, patents, copyrights, trademarks, service marks and the like, or any other type of property are not protected activities under P.L. 86-272.

The sale or delivery, and the solicitation for the sale or delivery, of any type of service that is not either (1) entirely ancillary to solicitation of orders for sales of tangible personal property or (2) otherwise set forth as a protected activity under Section IV.B of this Statement is also not protected under P. L. 86-272.

II SOLICITATION OF ORDERS AND ACTIVITIES ANCILLARY TO SOLICITATION

For in-state activity to be a protected activity under P.L. 86-272, it must be limited solely to *solicitation* (except for *de minimis* activities described in Article III and those activities conducted by independent contractors described in Article V). Solicitation means (1) speech or conduct that explicitly or implicitly invites an order; and (2) activities that neither explicitly nor implicitly invite an order but are entirely ancillary to requests for an order. *See Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992).

Ancillary activities are those activities that serve no independent business function for the seller apart from their connection to the solicitation of orders. Activities that a seller would engage in apart from soliciting orders are not ancillary to the solicitation of orders. The assignment of activities to sales personnel does not, merely by such assignment, make those activities ancillary to the solicitation of orders. Additionally, activities that seek to promote *sales* are not ancillary, because P.L. 86-272 does not protect activity that facilitates sales; it only protects ancillary activities that facilitate the request for an order.

Activities that are neither solicitation of orders for sales of tangible personal property nor entirely ancillary to solicitation, and that are not *de minimis*, are not protected.

III DE MINIMIS ACTIVITIES

De minimis activities are those activities that, when taken together, establish only a trivial connection with the taxing state. An activity conducted within a taxing state on a regular or systematic basis or pursuant to a company policy (whether the policy is in writing or not) normally will not be considered trivial. Whether or not an activity consists of a trivial or non-trivial connection with a state is measured on both a qualitative and quantitative basis. If an activity either qualitatively or quantitatively creates a non-trivial connection with the taxing state, and is otherwise not protected, then the activity exceeds the protection of P.L. 86-272. Establishing that unprotected activities only account for a relatively small part of the business conducted within the taxing state is not determinative of whether the activities are *de minimis*. The relative economic importance of unprotected in-state activities, as compared to protected activities, does not determine whether the conduct of the unprotected activities within the taxing state is inconsistent with the limited protection afforded by P.L. 86-272.

IV SPECIFIC LISTING OF UNPROTECTED AND PROTECTED ACTIVITIES

The following two listings -- Section IV.A and Section IV.B -- set forth in-state activities that are presently treated by the Supporting States as "Unprotected Activities" or "Protected Activities." These listings, as well as the contents of Section IV.C, which addresses activities conducted via the Internet, may be amended by each Supporting State.

Each Supporting State may choose, in its discretion, to treat any in-state activity as protected, even if P.L. 86-272 does not require protection, provided that the state treats such activity consistently for purposes of imposing tax and applying the state's throwback rule. The mere inclusion of an activity on the listing of "Protected Activities" by a state, therefore, is not a statement or admission by that state that P.L. 86-272 protects that activity.

A. UNPROTECTED ACTIVITIES:

The following in-state activities (assuming they are *de minimis*) are not considered solicitation of orders for sales of tangible personal property, entirely ancillary thereto, or otherwise protected under P.L. 86-272:

1. Making repairs or providing maintenance or service to the property sold or to be sold.
2. Collecting current or delinquent accounts, whether directly or by third parties, through assignment or otherwise.

3. Investigating credit worthiness.
4. Installation or supervision of installation at or after shipment or delivery.
5. Conducting training courses, seminars or lectures for personnel other than personnel involved only in solicitation.
6. Providing any kind of technical assistance or service including, but not limited to, engineering assistance or design service, when one of the purposes thereof is other than the facilitation of the solicitation of orders.
7. Investigating, handling, or otherwise assisting in resolving customer complaints, other than mediating direct customer complaints when the sole purpose of such mediation is to ingratiate the sales personnel with the customer.
8. Approving or accepting orders.
9. Repossessing property.
10. Securing deposits on sales.
11. Picking up or replacing damaged or returned property.
12. Hiring, training, or supervising personnel, other than personnel involved only in solicitation.
13. Using agency stock checks or any other instrument or process by which sales are made by sales personnel.
14. Maintaining a sample or display room in excess of two weeks (14 days) at any one location within the state during the tax year.
15. Carrying samples for sale, exchange or distribution in any manner for consideration or other value.
16. Owning, leasing, using or maintaining any of the following facilities or property in-state:
 - a. Repair shop.
 - b. Parts department.
 - c. Any kind of office other than an in-home office as described as permitted under IV.A.18 and IV.B.2.
 - d. Warehouse.

- e. Meeting place for directors, officers, or employees.
 - f. Stock of goods other than samples for sales personnel or that are used entirely ancillary to solicitation.
 - g. Telephone answering service that is publicly attributed to the business or to employees or agent(s) of the business in their representative status.
 - h. Mobile stores, *i.e.*, vehicles with drivers who are sales personnel making sales from the vehicles.
 - i. Real property or fixtures to real property of any kind.
17. Consigning stock of goods or other tangible personal property to any person, including an independent contractor, for sale.
18. Maintaining, by an employee or other representative, an office or place of business of any kind (other than an in-home office located within the residence of the employee or representative that (i) is not publicly attributed to the business or to the employee or representative of the company in an employee or representative capacity, (ii) so long as the use of the office is limited to soliciting and receiving orders from customers; for transmitting such orders outside the state for acceptance or rejection by the business; or for such other activities that are protected under P.L. 86-272).

A telephone listing or other public listing within the state for the business or for an employee or representative of the business in such capacity or other indications through advertising or business literature that the business or its employee or representative can be contacted at a specific address within the state normally will be determined as the business maintaining within this state an office or place of business attributable to the business or to its employee or representative in a representative capacity. However, the normal distribution and use of business cards and stationery identifying the employee's or representative's name, street address, email address, telephone and fax numbers and affiliation with the business shall not, by itself, be considered as advertising or otherwise publicly attributing an office to the business or its employee or representative.

The maintenance of any office or other place of business in the state that does not strictly qualify as an "in-home" office as described above will, by itself, cause the loss of protection.

For the purpose of this subsection it is not relevant whether the business pays directly, indirectly, or not at all for the cost of maintaining an in-home office.

19. Entering into franchising or licensing agreements; selling or otherwise disposing of franchises and licenses; or selling or otherwise transferring tangible personal property pursuant to such franchise or license by the franchisor or licensor to its franchisee or licensee within the state.

20. Activities performed by an employee who telecommutes on a regular basis from within the state unless the activities constitute the solicitation of orders for sales of tangible personal property or are entirely ancillary to such solicitation.
21. Conducting an activity not listed in Section IV.B below which is not entirely ancillary to requests for orders, even if the activity helps to increase purchases.

B. PROTECTED ACTIVITIES:

The following in-state activities are protected:

1. Soliciting orders for sales of tangible personal property by any type of advertising.
2. Soliciting of orders for sales of tangible personal property by an in-state resident employee or representative of the business, so long as the employee or representative does not maintain or use any office or other place of business in the state other than an "in-home" office as described in IV.A.18.
3. Carrying samples and promotional materials only for display or distribution without charge or other consideration.
4. Furnishing and setting up display racks and advising customers on the display of the business's products without charge or other consideration.
5. Providing automobiles to sales personnel for their use in conducting protected activities.
6. Passing orders, inquiries and complaints on to the home office.
7. Missionary sales activities; *i.e.*, the solicitation of indirect customers for the business's goods. For example, a manufacturer's solicitation of retailers to buy the manufacturer's goods from the manufacturer's wholesale customers is protected if these solicitation activities are otherwise immune.
8. Coordinating shipment or delivery without payment or other consideration and providing information relating thereto either prior or subsequent to the placement of an order.
9. Checking of customers' inventories without a charge therefor (for re-order, but not for other purposes such as quality control).
10. Maintaining a sample or display room for two weeks (14 days) or less at any one location within the state during the tax year.

11. Recruiting, training or evaluating sales personnel, including occasionally using homes, hotels or similar places for meetings with sales personnel.
12. Mediating direct customer complaints when the purpose thereof is solely for ingratiating the sales personnel with the customer and facilitating requests for orders.
13. Owning, leasing, using or maintaining personal property for use in the employee or representative's "in-home" office or automobile that is limited to the conducting of protected activities. Therefore, the use of personal property such as a cellular telephone, facsimile machine, duplicating equipment, personal computer and computer software that is limited to the carrying on of protected solicitation and activity entirely ancillary to such solicitation will not, by itself, remove the protection.

C. ACTIVITIES CONDUCTED VIA THE INTERNET:

To determine whether a person that sells tangible personal property via the Internet is shielded from taxation by P.L. 86-272 requires the same general analysis as with respect to persons that sell tangible personal property by other means. Thus, an Internet seller is shielded from taxation in the customer's state if the only business activity it engages in within that state is the solicitation of orders for sales of tangible personal property, which orders are sent outside that state for approval or rejection, and if approved, are shipped from a point outside of that state.

If the activities of such a seller within a state extends beyond solicitation of orders for sales of tangible personal property and is neither entirely ancillary to solicitation nor de minimis, P.L. 86-272 does not shield the seller from taxation by the customer's state.

As a general rule, when a business interacts with a customer via the business's website or app, the business engages in a business activity within the customer's state. However, for purposes of this Statement, when a business presents static text or photos on its website, that presentation does not in itself constitute a business activity within those states where the business's customers are located.

Following are examples of activities conducted by a business that operates a website offering for sale only items of tangible personal property, unless otherwise indicated. In each case, customer orders are approved or rejected, and the products are shipped from a location outside of the customer's state. The business has no contacts with the customer's state other than what is indicated.

1. The business provides post-sale assistance to in-state customers by posting a list of static FAQs with answers on the business's website. This posting of the static FAQs does not defeat the business's P.L. 86-272 immunity because it does not constitute a business activity within the customers' state.

2. The business regularly provides post-sale assistance to in-state customers via either electronic chat or email that customers initiate by clicking on an icon on the business's website. For example, the business regularly advises customers on how to use products after they

have been delivered. This in-state business activity defeats the business's P.L. 86-272 immunity in states where the customers are located because it does not constitute, and is not entirely ancillary to, the in-state solicitation of orders for sales of tangible personal property.

3. The business solicits and receives on-line applications for its branded credit card via the business's website. The issued cards will generate interest income and fees for the business. This in-state business activity defeats the business's P.L. 86-272 immunity in states where the on-line application for cards is available to customers because it does not constitute, and is not entirely ancillary to, the in-state solicitation of orders for sales of tangible personal property.

4. The business's website invites viewers in a customer's state to apply for non-sales positions with the business. The website enables viewers to fill out and submit an electronic application, as well as to upload a cover letter and resume. This in-state business activity defeats the business's P.L. 86-272 immunity in the customer's state because it does not constitute, and is not entirely ancillary to, the in-state solicitation of orders for sales of tangible personal property.

5. The business places Internet "cookies" onto the computers or other electronic devices of in-state customers. These cookies gather customer search information that will be used to adjust production schedules and inventory amounts, develop new products, or identify new items to offer for sale. This in-state business activity defeats the business's P.L. 86-272 immunity because it does not constitute, and is not entirely ancillary to, the in-state solicitation of orders for sales of tangible personal property.

6. The business places Internet "cookies" onto the computers or other devices of in-state customers. These cookies gather customer information that is only used for purposes entirely ancillary to the solicitation of orders for tangible personal property, such as: to remember items that customers have placed in their shopping cart during a current web session, to store personal information customers have provided to avoid the need for the customers to re-input the information when they return to the seller's website, and to remind customers what products they have considered during previous sessions. The cookies perform no other function, and these are the only types of cookies delivered by the business to its customers' computers or other devices. This in-state business activity does not defeat the business's P.L. 86-272 immunity because it is entirely ancillary to the in-state solicitation of orders for sales of tangible personal property.

7. The business remotely fixes or upgrades products previously purchased by its in-state customers by transmitting code or other electronic instructions to those products via the Internet. This in-state business activity defeats the business's P.L. 86-272 immunity because it does not constitute, and is not entirely ancillary to, the in-state solicitation of orders for sales of tangible personal property.

8. The business offers and sells extended warranty plans via its website to in-state customers who purchase the business's products. Selling, or offering to sell, a service that is not entirely ancillary to the solicitation of orders for sales of tangible personal property, such as an extended warranty plan, defeats the business's P.L. 86-272 immunity—*see* Article I.

9. The business contracts with a marketplace facilitator that facilitates the sale of the business's products on the facilitator's on-line marketplace. The marketplace facilitator maintains

inventory, including some of the business's products, at fulfillment centers in various states where the business's customers are located. This maintenance of the business's products defeats the business's P.L. 86-272 immunity in those states where the fulfillment centers are located—*see* Article V.

10. The business contracts with in-state customers to stream videos and music to electronic devices for a charge. This in-state business activity defeats the business's P.L. 86-272 immunity because streaming does not constitute the sale of tangible personal property for purposes of P.L. 86-272—*see* Article I.

11. The business offers for sale only items of tangible personal property on its website. The website enables customers to search for items, read product descriptions, select items for purchase, choose among delivery options, and pay for the items. The business does not engage in any in-state business activities that are not described in this example, such as the activities described in examples 2-5 and 7-10 above. This business activity does not defeat the business's P.L. 86-272 immunity because the business engages exclusively in in-state activities that either constitute solicitation of orders for sales of tangible personal property or are entirely ancillary to solicitation.

V INDEPENDENT CONTRACTORS

P.L. 86-272 provides protection to certain in-state activities if conducted by an independent contractor that would not be afforded if performed by the business or its employees or other representatives. Independent contractors may engage in the following limited activities in the state without the business's loss of immunity:

1. Soliciting sales.
2. Making sales.
3. Maintaining an office.

Sales representatives and others who represent a single principal are not considered to be independent contractors.

Maintenance of a stock of goods in the state by the independent contractor under consignment or any other type of arrangement with the business, except for purposes of display and solicitation, removes the protection.

Performance of unprotected activities by an independent contractor on behalf of a seller, such as performing warranty work or accepting returns of products, also removes the statutory protection.

VI

APPLICATION OF DESTINATION STATE LAW IN CASE OF CONFLICT

When it appears that two or more Supporting States have included or will include the same receipts from a sale in their respective receipts factor numerators, at the written request of the business, these states will confer with one another in good faith to determine which state should be assigned the receipts. Such conference will identify what law, regulation or written guideline, if any, has been adopted in the destination state with respect to the issue. The destination state is the state in which the purchaser or its designee actually receives the property, regardless of f.o.b. point or other conditions of sale.

In determining which state is to receive the assignment of the receipts at issue, preference is given to any clearly applicable law, regulation or written guideline that has been adopted by the destination state. However, except in the case of the definition of what constitutes "tangible personal property," a Supporting State is not required by this Statement to follow any other state's (including the destination state's) law, regulation or written guideline if it determines that to do so (i) would conflict with its own laws, regulations, or written guidelines and (ii) would not clearly reflect the income-producing activity of the business within its borders.

Notwithstanding any provision set forth in this Statement to the contrary, each Supporting State will apply the destination state's definition of "tangible personal property" to determine the application of P.L. 86-272 as it relates to the origin state's throwback rule, if any. If the destination state lacks a definition that would enable a determination of whether the sale in question is a sale of "tangible personal property," then each state may treat the sale in any manner that would clearly reflect the income-producing activity of the business within its borders.

VII

MISCELLANEOUS PRACTICES

A. APPLICATION OF STATEMENT TO FOREIGN COMMERCE.

Congress explicitly applied P.L. 86-272 only to "interstate commerce." Therefore, by its terms, the statute does not apply to foreign commerce. *See Border Pipe Line Co. v. Fed. Power Comm'n*, 171 F.2d 149 (D.C. Cir. 1948) (explaining that Congress may choose to protect or regulate interstate but not foreign commerce). States, however, may elect to apply P.L. 86-272 in the context of foreign commerce. If a Supporting State applies P.L. 86-272 in the context of foreign commerce, it will do so consistently whether it is determining if activities of a foreign seller are protected or whether it is determining if sales into the foreign jurisdiction will be thrown back.

**B. APPLICATION TO CORPORATION INCORPORATED IN STATE OR TO PERSON
RESIDENT OR DOMICILED IN STATE.**

The protection afforded by P.L. 86-272 does not apply to a corporation incorporated under the laws of the taxing state or to a person who is a resident of or domiciled in the taxing state.

C. REGISTRATION OR QUALIFICATION TO DO BUSINESS.

Merely registering or qualifying to do business within a state, without more, will not forfeit the protection that may otherwise apply under P.L. 86-272 in that state. Seeking to use or protect any additional benefit under state law through engaging in other activity not protected under P.L. 86-272 (such as protecting a trade secret or corporate name) will forfeit the protection.

**D. LOSS OF PROTECTION FOR CONDUCTING UNPROTECTED ACTIVITY DURING
PART OF TAX YEAR.**

The protection afforded by P.L. 86-272 is determined on a tax year by tax year basis. Therefore, if at any time during a tax year a business conducts activities that are not protected under P.L. 86-272, the business will not be considered protected under P.L. 86-272 for the entirety of that year.

Addendum I

Public Law 86-272

••• §381. Imposition of net income tax.

(a) Minimum Standards.

No state or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

- (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection and, if approved, are filled by shipment or delivery from a point outside the State; and
- (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

(b) Domestic corporations; persons domiciled in or residents of a State.

The provisions of subsection (a) of this section shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to ----

- (1) any corporation which is incorporated under the laws of such State; or
- (2) any individual who, under the laws of such State, is domiciled in, or a resident, of such State.

(c) Sales or solicitation of orders for sales by independent contractors .

For purposes of subsection (a) of this section, a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

(d) Definitions.

For purposes of this section ----

- (1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principle and who holds himself out as such in the regular course of his business activities; and
- (2) the term "representative" does not include an independent contractor.

... §382. Assessment of net income taxes; limitations; collection.

- (a) No State, or political subdivision thereof, shall have power to assess, after September 14, 1959, any net income tax which was imposed by such State or political subdivision, as the case may be, for any taxable year ending on or before such date, on the income derived within such State by any person from interstate commerce, if the imposition of such tax for a taxable year ending after such date is prohibited by section 381 of this title.
- (b) the provisions of subsection (a) of this section shall not be construed ----
 - (1) to invalidate the collection, on or before September 14, 1959, of any net income tax imposed for a taxable year ending on or before such date, or
 - (2) to prohibit the collection, after September 14, 1959, of any net income tax which was assessed on or before such date for a taxable year ending on or before such date.

... §383. Definition.

For purpose of this chapter, the term "net income tax" means any tax imposed on, or measured by, net income.

... §384. Separability of provisions.

If any provision of this chapter or the application of such provision to any person or circumstance is held invalid, the remainder of this chapter or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

Addendum II

MTC Factor Presence Nexus Standard for Business Activity Taxes

Approved by the Multistate Tax Commission October 17, 2002

A. (1) Individuals who are residents or domiciliaries of this State and business entities that are organized or commercially domiciled in this State have substantial nexus with this State.

(2) Nonresident individuals and business entities organized outside the State that are doing business in this State have substantial nexus and are subject to [list appropriate business activity taxes for the state, with statutory citations] when in any tax period the property, payroll or sales of the individual or business in the State, as they are defined below in Subsection C, exceeds the thresholds set forth in Subsection B.

B. (1) Substantial nexus is established if any of the following thresholds is exceeded during the tax period:

(a) a dollar amount of \$50,000 of property; or

(b) a dollar amount of \$50,000 of payroll; or

(c) a dollar amount of \$500,000 of sales; or

(d) twenty-five percent of total property, total payroll or total sales.

(2) At the end of each year, the [tax administrator] shall review the cumulative percentage change in the consumer price index. The [tax administrator] shall adjust the thresholds set forth in paragraph (1) if the consumer price index has changed by 5% or more since January 1, 2003, or since the date that the thresholds were last adjusted under this subsection. The thresholds shall be adjusted to reflect that cumulative percentage change in the consumer price index. The adjusted thresholds shall be rounded to the nearest \$1,000. As used in this subsection, "consumer price index" means the Consumer Price Index for All Urban Consumers (CPI-U) available from the Bureau of Labor Statistics of the United States Department of Labor. Any adjustment shall apply to tax periods that begin after the adjustment is made.

C. Property, payroll and sales are defined as follows:

(1) Property counting toward the threshold is the average value of the taxpayer's real property and tangible personal property owned or rented and used in this State during the tax period. Property owned by the taxpayer is valued at its original cost basis. Property rented by the taxpayer is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from sub-rentals. The

average value of property shall be determined by averaging the values at the beginning and ending of the tax period; but the tax administrator may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.

(2) Payroll counting toward the threshold is the total amount paid by the taxpayer for compensation in this State during the tax period. Compensation means wages, salaries, commissions and any other form of remuneration paid to employees and defined as gross income under Internal Revenue Code § 61. Compensation is paid in this State if (a) the individual's service is performed entirely within the State; (b) the individual's service is performed both within and without the State, but the service performed without the State is incidental to the individual's service within the State; or (c) some of the service is performed in the State and (1) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the State, or (2) the base of operations or the place from which the service is directed or controlled is not in any State in which some part of the service is performed, but the individual's residence is in this State.

(3) Sales counting toward the threshold include the total dollar value of the taxpayer's gross receipts, including receipts from entities that are part of a commonly owned enterprise as defined in D(2) of which the taxpayer is a member, from

(a) the sale, lease or license of real property located in this State;

(b) the lease or license of tangible personal property located in this State;

(c) the sale of tangible personal property received in this State as indicated by receipt at a business location of the seller in this State or by instructions, known to the seller, for delivery or shipment to a purchaser (or to another at the direction of the purchaser) in this State; and

(d) The sale, lease or license of services, intangibles, and digital products for primary use by a purchaser known to the seller to be in this State. If the seller knows that a service, intangible, or digital product will be used in multiple States because of separate charges levied for, or measured by, the use at different locations, because of other contractual provisions measuring use, or because of other information provided to the seller, the seller shall apportion the receipts according to usage in each State.

(e) If the seller does not know where a service, intangible, or digital product will be used or where a tangible will be received, the receipts shall count toward the threshold of the State indicated by an address for the purchaser that is available from the business records of the seller maintained in the ordinary course of business when such use does not constitute bad faith. If that is not known, then the receipts shall count toward the threshold of the State indicated by an address for the purchaser that is obtained during the consummation of the sale, including the address of the purchaser's payment instrument, if no other address is available, when the use of this address does not constitute bad faith.

(4) Notwithstanding the other provisions of this Subsection C, for a taxpayer subject to the special apportionment methods under [Multistate Tax Commission Regulations IV.18.(d) through (j)], the property, payroll and sales for measuring against the nexus thresholds shall be defined as they are for apportionment purposes under those regulations. Financial institutions subject to an apportioned income or franchise tax shall determine property, payroll and sales for nexus threshold purposes the same as for apportionment purposes under the [MTC Recommended Formula for the Apportionment and Allocation of Net Income of Financial Institutions]. Pass-through entities, including, but not limited to, partnerships, limited liability companies, S corporations, and trusts, shall determine threshold amounts at the entity level. If property, payroll or sales of an entity in this State exceeds the nexus threshold, members, partners, owners, shareholders or beneficiaries of that pass-through entity are subject to tax on the portion of income earned in this State and passed through to them.

D. (1) Entities that are part of a commonly owned enterprise shall determine whether they meet the threshold for nexus as follows:

(a) Commonly owned enterprises shall first aggregate the property, payroll and sales of their entities that have a minimum presence in this State of \$5000 of combined property, payroll and sales, including those entities that independently exceed a threshold and separately have nexus. The aggregate number shall be reduced based on detailed disclosure of any intercompany transactions where inclusion would result in one State's double counting assets or revenue. If that aggregation of property, payroll and sales meets any threshold in Subsection B, the enterprise shall file a joint information return as specified by the [tax agency] separately listing the property, payroll and sales in this State of each entity.

(b) Those entities of the commonly owned enterprise that are listed in the joint information return and that are also part of a unitary business grouping conducting business in this State shall then aggregate the property, payroll and sales of each such unitary business grouping on the joint information return. The aggregate number shall be reduced based on detailed disclosure of any intercompany transactions where inclusion would result in one State's double counting assets or revenue. The entities shall base the unitary business groupings on the unitary combined report filed in this State. If no unitary combined report is required in this State, then the taxpayer shall use the unitary business groupings the taxpayer most commonly reports in States that require combined returns.

(c) If the aggregate property, payroll or sales in this State of the entities of any unitary business of the enterprise meets a threshold in Subsection B, then each entity that is part of that unitary business is deemed to have nexus and shall file and pay income or franchise tax as required by law.

(2) "Commonly owned enterprise" means a group of entities under common control either through a common parent that owns, or constructively owns, more than 50 percent of the voting power of the outstanding stock or ownership interests or through five or fewer individuals (individuals, estates or trusts) that own, or constructively own, more than 50 percent of the voting

power of the outstanding stock or ownership interests taking into account the ownership interest of each such person only to the extent such ownership is identical with respect to each such entity.

E. A State without jurisdiction to impose tax on or measured by net income on a particular taxpayer because that taxpayer comes within the protection of Public Law 86-272 (15 U.S.C. § 381) does not gain jurisdiction to impose such a tax even if the taxpayer's property, payroll or sales in the State exceeds a threshold in Subsection B. Public Law 86-272 preempts the state's authority to tax and will therefore cause sales of each protected taxpayer to customers in the State to be thrown back to those sending States that require throwback. If Congress repeals the application of Public Law 86-272 to this State, an out-of-state business shall not have substantial nexus in this State unless its property, payroll or sales exceeds a threshold in this provision.

[P.L. 86-272 Work Group proposed revision (2/20/2020), marked to show changes from current Statement of Information adopted by the Commission in 2001]

**Statement of Information Concerning Practices of
Multistate Tax Commission and Signatory States
Under Public Law 86-272**

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INTRODUCTION

In this Statement, “Supporting State” means a State that adopts or otherwise expressly indicates support for this Statement by legislation, regulation or other administrative action. Other states may adopt or otherwise indicate support for individual sections of this Statement.

This Statement addresses the application of Public Law 86-272, 15 U.S.C. §§381-384, (hereafter (which is set forth in Addendum I). P.L. 86-272) restricts, which Congress adopted in 1959, prohibits a state from imposing a net income tax on the income of a person derived within its borders the state from interstate commerce if the only business activity of the company activities within the state consists conducted by or on behalf of the person consist of the solicitation of orders for sales of tangible personal property, which provided that the orders are to be sent outside the state for acceptance or rejection, and, if accepted, are filled by shipment or delivery from a point outside the state. The term “net income tax” includes a franchise tax measured by net income. If any sales are made into a state which is precluded by P.L. 86-272 from taxing the income of the seller, such sales remain subject to throwback to the appropriate state which does have jurisdiction to impose its net income tax upon the income derived from those sales.

It is the policy of the state signatories hereto to impose their net income tax, subject to State and Federal legislative limitations, to the fullest extent constitutionally permissible. Interpretation of the solicitation of orders standard in In the decades since P.L. 86-272 requires a determination of the fair meaning of that term in the first instance. The United States Supreme Court has recently established a standard for interpreting the term “solicitation” and this Statement has been revised to conform to such standard was enacted, the way in which interstate business is conducted has changed significantly. Congress, however, has neither created a federal mechanism to provide administrative guidance to taxpayers nor has it updated the statute to indicate how it applies to new business activities. See Wisconsin Department of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 112 S.Ct. 2239, 120 L.Ed.2d 174 (1992). In those cases where there may be reasonable differences of opinion (finding the statute’s minimum standard “to be somewhat less than entirely clear”). The contents of this Statement are intended to serve as to whether the disputed activity exceeds what is protected by P.L. 86-272, the signatory general guidance to taxpayers and to provide notice as to how Supporting States will apply the statute.

This Statement is guided by the principle that the preemption of state taxation that is required by P.L. 86-272 will be limited to those activities that fall within sovereign authority of states to impose tax will not be preempted unless it is the “clear and manifest purpose of Congress”. See to do so. Department of Revenue of Oregon v. ACF Industries, Inc., et al., 510 U.S. 332, 114 S.Ct. 843, 127 L. Ed.2d 165345 (1994), Cipollone v. Liggett Group, Inc., 505 U.S. 504, 112

~~S.Ct. 2608, 120 L. Ed.2d 407, 422 (1992);~~. *See also Heublein, Inc. v. South Carolina Tax Com., Comm'n*, 409 U.S. 275, 281-282 (1972);) (noting that Congress must convey “its purpose clearly” or “it will not be deemed to have significantly changed the Federal-State balance”).

~~The following information reflects~~Supreme Court recently opined, in *South Dakota v. Wayfair, Inc.*, construing the Commerce Clause, that an Internet seller “may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term.” 138 S. Ct. ~~signatory states' current practices with regard to~~2080, 2095 (2018). Although the *Wayfair* Court was not interpreting P.L. 86-272, the Supporting States consider the Court’s analysis as to: (1) virtual contacts to be relevant to the question of whether a particular factual circumstanceseller is considered under P.L. 86-272 or permitted under thisengaged in business activities in states where its customers are located for purposes of the statute.

~~This Statement as either protected or not protected does not attempt to take into account limitations on the application of business income taxes other than P.L. 86-272, including those limitations that may be provided under state law. For example, the Multistate Tax Commission has adopted a model factor presence nexus statute and recommends that states adopt that statute to shield from taxation small businesses or businesses that have minimal contacts with the state. See Factor Presence Nexus Standard for Business Activity Taxes, adopted by reason of P.L. 86-272; and (2) the jurisdictional standards the Multistate Tax Commission on October 12, 2002 (which will apply to sales madeis set forth in another state for purposesAddendum II).~~

~~Finally, P.L. 86-272 not only affects the determination of applyingwhether a state into which tangible personal property is delivered (the “destination state”) may tax the income of the seller, but it also affects the determination of whether the state from which tangible personal property is shipped (the “origin state”) may subject the related receipts to that state’s throwback rule (if applicable) with respect to such sales. It is the intent of the signatory states-. The Supporting States intend to apply this Statement uniformly to factual circumstances, irrespective of whether such application involves an analysis for jurisdictional purposes in the state into which such tangible personal property has been shipped or delivered or forthe destination state is determining whether it can tax the income of the seller, or whether the origin state, is determining whether the related receipts are subject to that state’s throwback purposes in the state from which such property has been shipped or delivered.rule.~~

I NATURE OF PROPERTY BEING SOLD

~~Only the solicitation to sell~~ tangible personal property is afforded immunity under P.L. ~~8627286-272~~; therefore, the leasing, renting, licensing or other disposition of tangible personal property, or transactions involving ~~intangibles~~intangible property, such as franchises, patents, copyrights, ~~trade markstrademarks~~, service marks and the like, or any other type of property are not protected activities under P.L. 86-272.

~~The sale or delivery, and the solicitation for the sale or delivery, of any type of service that is not either (1) entirely ancillary to solicitation of orders for sales of tangible personal property or~~

(2) otherwise set forth as a protected activity under ~~the~~ Section IV.B. ~~hereof of this Statement~~ is also not protected under ~~Public Law P. L. 86-272 or this Statement.~~

II

SOLICITATION OF ORDERS AND ACTIVITIES ANCILLARY TO SOLICITATION

For ~~the~~ in-state activity to be a protected activity under P.L. 86-272, it must be limited solely to *solicitation* (except for *de minimis* activities described in Article III. and those activities conducted by independent contractors described in ~~Article V. below~~). Solicitation means (1) speech or conduct that explicitly or implicitly invites an order; and (2) activities that neither explicitly nor implicitly invite an order, but are entirely ancillary to requests for an order. *See Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992).

Ancillary activities are those activities that serve no independent business function for the seller apart from their connection to the solicitation of orders. Activities that a seller would engage in apart from soliciting orders ~~shall~~are not ~~be considered as~~ ancillary to the solicitation of orders. The ~~mere~~ assignment of activities to sales personnel does not, merely by such assignment, make ~~such those~~ activities ancillary to the solicitation of orders. Additionally, activities that seek to promote *sales* are not ancillary, because P.L. 86-272 does not protect activity that facilitates sales; it only protects ancillary activities that facilitate the request for an order. ~~The conducting of activities not falling within the foregoing definition of solicitation will cause the company to lose its protection from a net income tax afforded by P.L. 86-272, unless the disqualifying activities, taken together, are either de minimis or are otherwise permitted under this Statement.~~

Activities that are neither solicitation of orders for sales of tangible personal property nor entirely ancillary to solicitation, and that are not *de minimis*, are not protected.

III

DE MINIMIS ACTIVITIES

De minimis activities are those activities that, when taken together, establish only a trivial connection with the taxing ~~State~~state. An activity conducted within a taxing ~~State~~state on a regular or systematic basis or pursuant to a company policy (whether ~~such the~~ policy is in writing or not) ~~shall~~ normally will not be considered trivial. Whether or not an activity consists of a trivial or non-trivial connection with ~~the State~~a state is ~~to be~~ measured on both a qualitative and quantitative basis. If ~~such an~~ activity either qualitatively or quantitatively creates a non-trivial connection with the taxing ~~State~~state, and is otherwise not protected, then ~~such the~~ activity exceeds the protection of P.L. ~~86272~~86-272. Establishing that ~~the disqualifying unprotected~~ activities only account for a relatively small part of the business conducted within the taxing ~~State~~state is not determinative of whether the activities are de minimis ~~level of activity exists.~~ The relative economic importance of ~~the disqualifying unprotected~~ in-state activities, as compared to ~~the~~ protected activities, does not determine whether the conduct of the ~~disqualifying unprotected~~ activities within the taxing ~~State~~state is inconsistent with the limited protection afforded by P.L. 86-272.

IV SPECIFIC LISTING OF UNPROTECTED AND PROTECTED ACTIVITIES

The following two listings ~~--- Section IV.A. and Section IV.B. ---~~ set forth ~~the~~ in-state activities that are presently treated by the ~~signatory state~~ Supporting States as "Unprotected Activities" or "Protected Activities". ~~Such.~~ These listings, ~~as well as the contents of Section IV.C, which addresses activities conducted via the Internet, may be subject to an amendment by addition or deletion that appears on the individual signatory state's Signature Page attached to this Statement. [Note: a list of states that have adopted this Statement, together with a compilation of such additions and deletions, is available from the MTC].~~ amended by each Supporting State. ~~The signatory state has included on the list of "Protected Activities" those in-state activities that are either required protection under P.L. 86-272; or, if not so required, that the signatory state~~

Each Supporting State may choose, in its discretion, has permitted protection. The to treat any in-state activity as protected, even if P.L. 86-272 does not require protection, provided that the state treats such activity consistently for purposes of imposing tax and applying the state's throwback rule. The mere inclusion of an activity on the listing of "Protected Activities", by a state, therefore, is not a statement or admission by the signatory that state that said P.L. 86-272 protects that activity is required any protection under the Public Law.

A.

A. UNPROTECTED ACTIVITIES:

The following in-state activities (assuming they are ~~not of a de minimis level~~) are not considered ~~as either~~ solicitation of orders ~~or for sales of tangible personal property, entirely ancillary thereto or otherwise protected under P.L. 86-272 and will cause, or~~ otherwise protected ~~sales to lose their protection under the Public Law; under P.L. 86-272:~~

1. Making repairs or providing maintenance or service to the property sold or to be sold.
2. Collecting current or delinquent accounts, whether directly or by third parties, through assignment or otherwise.
3. Investigating credit worthiness.
4. Installation or supervision of installation at or after shipment or delivery.
5. Conducting training courses, seminars or lectures for personnel other than personnel involved only in solicitation.
6. Providing any kind of technical assistance or service including, but not limited to, engineering assistance or design service, when one of the purposes thereof is other than the facilitation of the solicitation of orders.

7. Investigating, handling, or otherwise assisting in resolving customer complaints, other than mediating direct customer complaints when the sole purpose of such mediation is to ingratiate the sales personnel with the customer.
8. Approving or accepting orders.
9. Repossessing property.
10. Securing deposits on sales.
11. Picking up or replacing damaged or returned property.
12. Hiring, training, or supervising personnel, other than personnel involved only in solicitation.
13. Using agency stock checks or any other instrument or process by which sales are made ~~within this state~~ by sales personnel.
14. Maintaining a sample or display room in excess of two weeks (14 days) at any one location within the state during the tax year.
15. Carrying samples for sale, exchange or distribution in any manner for consideration or other value.
16. Owning, leasing, using or maintaining any of the following facilities or property in-state:
 - a. Repair shop.
 - b. Parts department.
 - c. Any kind of office other than an in-home office as described as permitted under IV.A.18 and IV.B.2.
 - d. Warehouse.
 - e. Meeting place for directors, officers, or employees.
 - f. Stock of goods other than samples for sales personnel or that are used entirely ancillary to solicitation.
 - g. Telephone answering service that is publicly attributed to the ~~company~~business or to employees or agent(s) of the ~~company~~business in their representative status.
 - h. Mobile stores, *i.e.*, vehicles with drivers who are sales personnel making sales from the vehicles.
 - i. Real property or fixtures to real property of any kind.
17. Consigning stock of goods or other tangible personal property to any person, including an independent contractor, for sale.

18. Maintaining, by ~~anyan~~ employee or other representative, an office or place of business of any kind (other than an in-home office located within the residence of the employee or representative that (i) is not publicly attributed to the ~~companybusiness~~ or to the employee or representative of the company in an employee or representative capacity, ~~and~~, (ii) so long as the use of ~~such the~~ office is limited to soliciting and receiving orders from customers; for transmitting such orders outside the state for acceptance or rejection by the ~~companybusiness~~; or for such other activities that are protected under ~~Public Law P.L. 86-272 or under paragraph IV.B. of this Statement~~).

A telephone listing or other public listing within the state for the ~~companybusiness~~ or for an employee or representative of the ~~companybusiness~~ in such capacity or other indications through advertising or business literature that the ~~companybusiness~~ or its employee or representative can be contacted at a specific address -within the state ~~shall~~ normally will be determined as the ~~companybusiness~~ maintaining within this state an office or place of business attributable to the ~~companybusiness~~ or to its employee or representative in a representative capacity~~—~~. However, the normal distribution and use of business cards and stationery identifying the employee's or representative's name, street address, email address, telephone and fax numbers and affiliation with the ~~companybusiness~~ shall not, by itself, be considered as advertising or otherwise publicly attributing an office to the ~~companybusiness~~ or its employee or -representative.

The maintenance of any office or other place of business in ~~this the~~ state that does not strictly qualify as an "in-home" office as described above ~~shall will~~, by itself, cause the loss of protection ~~under this Statement~~.

For the purpose of this subsection it is not relevant whether the ~~companybusiness~~ pays directly, indirectly, or not at all for the cost of maintaining ~~such inhome an in-home~~ office.

19. Entering into franchising or licensing agreements; selling or otherwise disposing of franchises and licenses; or selling or otherwise transferring tangible personal property pursuant to such franchise or license by the franchisor or licensor to its franchisee or licensee within the state.

———~~[RESERVED.]~~

20. Activities performed by an employee who telecommutes on a regular basis from within the state unless the activities constitute the solicitation of orders for sales of tangible personal property or are entirely ancillary to such solicitation.

21. Conducting ~~anyan~~ activity not listed in ~~paragraph~~Section IV.B. below which is not entirely ancillary to requests for orders, even if ~~such the~~ activity helps to increase purchases.

———B.

B. PROTECTED ACTIVITIES:

_____The following in-state activities ~~will not cause the loss of protection for otherwise~~are protected ~~sales~~;

1. Soliciting orders for sales of tangible personal property by any type of advertising.
2. Soliciting of orders for sales of tangible personal property by an in-state resident employee or representative of the ~~company~~business, so long as ~~such person~~the employee or representative does not maintain or use any office or other place of business in the state other than an "in-home" office as described in IV.A.18. ~~above~~.
3. Carrying samples and promotional materials only for display or distribution without charge or other consideration.
4. Furnishing and setting up display racks and advising customers on the display of the ~~company's~~business's products without charge or other consideration.
5. Providing automobiles to sales personnel for their use in conducting protected activities.
6. Passing orders, inquiries and complaints on to the home office.
7. Missionary sales activities; *i.e.*, the solicitation of indirect customers for the ~~company's~~business's goods.- For example, a manufacturer's solicitation of retailers to buy the manufacturer's goods from the manufacturer's wholesale customers ~~would be~~is protected if ~~such~~these solicitation activities are otherwise immune.
8. Coordinating shipment or delivery without payment or other consideration and providing information relating thereto either prior or subsequent to the placement of an order.
9. Checking of customers' inventories without a charge therefor (for re-order, but not for other purposes such as quality control).
10. Maintaining a sample or display room for two weeks (14 days) or less at any one location within the state during the tax year.
11. Recruiting, training or evaluating sales personnel, including occasionally using homes, hotels or similar places for meetings with sales personnel.
12. Mediating direct customer complaints when the purpose thereof is solely for ingratiating the sales personnel with the customer and facilitating requests for orders.

13. Owning, leasing, using or maintaining personal property for use in the employee or representative's "in-home" office or automobile that is ~~solely~~ limited to the conducting of protected activities. Therefore, the use of personal property such as a cellular telephone, facsimile machine, duplicating equipment, personal computer and computer software that is limited to the carrying on of protected solicitation and activity entirely ancillary to such solicitation ~~or permitted by this Statement under paragraph IV.B. shall will~~ not, by itself, remove the protection ~~under this Statement.~~

v

C. ACTIVITIES CONDUCTED VIA THE INTERNET:

To determine whether a person that sells tangible personal property via the Internet is shielded from taxation by P.L. 86-272 requires the same general analysis as with respect to persons that sell tangible personal property by other means. Thus, an Internet seller is shielded from taxation in the customer's state if the only business activity it engages in within that state is the solicitation of orders for sales of tangible personal property, which orders are sent outside that state for approval or rejection, and if approved, are shipped from a point outside of that state.

If the activities of such a seller within a state extends beyond solicitation of orders for sales of tangible personal property and is neither entirely ancillary to solicitation nor de minimis, P.L. 86-272 does not shield the seller from taxation by the customer's state.

As a general rule, when a business interacts with a customer via the business's website or app, the business engages in a business activity within the customer's state. However, for purposes of this Statement, when a business presents static text or photos on its website, that presentation does not in itself constitute a business activity within those states where the business's customers are located.

Following are examples of activities conducted by a business that operates a website offering for sale only items of tangible personal property, unless otherwise indicated. In each case, customer orders are approved or rejected, and the products are shipped from a location outside of the customer's state. The business has no contacts with the customer's state other than what is indicated.

1. The business provides post-sale assistance to in-state customers by posting a list of static FAQs with answers on the business's website. This posting of the static FAQs does not defeat the business's P.L. 86-272 immunity because it does not constitute a business activity within the customers' state.

2. The business regularly provides post-sale assistance to in-state customers via either electronic chat or email that customers initiate by clicking on an icon on the business's website. For example, the business regularly advises customers on how to use products after they have been delivered. This in-state business activity defeats the business's P.L. 86-272 immunity in states where the customers are located because it does not constitute, and is not entirely ancillary to, the in-state solicitation of orders for sales of tangible personal property.

3. The business solicits and receives on-line applications for its branded credit card via the business's website. The issued cards will generate interest income and fees for the business. This in-state business activity defeats the business's P.L. 86-272 immunity in states where the on-line application for cards is available to customers because it does not constitute, and is not entirely ancillary to, the in-state solicitation of orders for sales of tangible personal property.

4. The business's website invites viewers in a customer's state to apply for non-sales positions with the business. The website enables viewers to fill out and submit an electronic application, as well as to upload a cover letter and resume. This in-state business activity defeats the business's P.L. 86-272 immunity in the customer's state because it does not constitute, and is not entirely ancillary to, the in-state solicitation of orders for sales of tangible personal property.

5. The business places Internet "cookies" onto the computers or other electronic devices of in-state customers. These cookies gather customer search information that will be used to adjust production schedules and inventory amounts, develop new products, or identify new items to offer for sale. This in-state business activity defeats the business's P.L. 86-272 immunity because it does not constitute, and is not entirely ancillary to, the in-state solicitation of orders for sales of tangible personal property.

6. The business places Internet "cookies" onto the computers or other devices of in-state customers. These cookies gather customer information that is only used for purposes entirely ancillary to the solicitation of orders for tangible personal property, such as: to remember items that customers have placed in their shopping cart during a current web session, to store personal information customers have provided to avoid the need for the customers to re-input the information when they return to the seller's website, and to remind customers what products they have considered during previous sessions. The cookies perform no other function, and these are the only types of cookies delivered by the business to its customers' computers or other devices. This in-state business activity does not defeat the business's P.L. 86-272 immunity because it is entirely ancillary to the in-state solicitation of orders for sales of tangible personal property.

7. The business remotely fixes or upgrades products previously purchased by its in-state customers by transmitting code or other electronic instructions to those products via the Internet. This in-state business activity defeats the business's P.L. 86-272 immunity because it does not constitute, and is not entirely ancillary to, the in-state solicitation of orders for sales of tangible personal property.

8. The business offers and sells extended warranty plans via its website to in-state customers who purchase the business's products. Selling, or offering to sell, a service that is not entirely ancillary to the solicitation of orders for sales of tangible personal property, such as an extended warranty plan, defeats the business's P.L. 86-272 immunity—see Article I.

9. The business contracts with a marketplace facilitator that facilitates the sale of the business's products on the facilitator's on-line marketplace. The marketplace facilitator maintains inventory, including some of the business's products, at fulfillment centers in various states where the business's customers are located. This maintenance of the business's products defeats the business's P.L. 86-272 immunity in those states where the fulfillment centers are located—see Article V.

10. The business contracts with in-state customers to stream videos and music to electronic devices for a charge. This in-state business activity defeats the business's P.L. 86-272 immunity because streaming does not constitute the sale of tangible personal property for purposes of P.L. 86-272—see Article I.

11. The business offers for sale only items of tangible personal property on its website. The website enables customers to search for items, read product descriptions, select items for purchase, choose among delivery options, and pay for the items. The business does not engage in any in-state business activities that are not described in this example, such as the activities described in examples 2-5 and 7-10 above. This business activity does not defeat the business's P.L. 86-272 immunity because the business engages exclusively in in-state activities that either constitute solicitation of orders for sales of tangible personal property or are entirely ancillary to solicitation.

V INDEPENDENT CONTRACTORS

P.L. 86-272 provides protection— to certain in-state activities if conducted by an independent contractor that would not be afforded if performed by the ~~company~~business or its employees or other representatives. Independent contractors may engage in the following limited activities in the state without the ~~company's~~business's loss of immunity:

1. Soliciting sales.
2. Making sales.
3. Maintaining an office.

Sales representatives and others who represent a single principal are not considered to be independent contractors ~~and are subject to the same limitations as those provided under P.L. 86-272 and this Statement.~~

Maintenance of a stock of goods in the state by the independent contractor under consignment or any other type of arrangement with the ~~company~~business, except for purposes of display and solicitation, ~~shall remove~~removes the protection.

Performance of unprotected activities by an independent contractor on behalf of a seller, such as performing warranty work or accepting returns of products, also removes the statutory protection.

VI

APPLICATION OF DESTINATION STATE LAW IN CASE OF CONFLICT

When it appears that two or more ~~signatory states~~Supporting States have included or will include the same receipts from a sale in their respective ~~sales~~receipts factor numerators, at the written request of the ~~company, said business, these~~ states will ~~in good faith~~ confer with one another in good faith to determine which state should be assigned ~~said the~~ receipts. – Such conference ~~shall will~~ identify what law, regulation or written guideline, if any, has been adopted in the ~~state of~~ destination state with respect to the issue. – The ~~state of~~ destination ~~shall be that location at~~state is the state in which the purchaser or its designee actually receives the property, regardless of f.o.b. point or other conditions of sale.

In determining which state is to receive the assignment of the receipts at issue, preference ~~shall be is~~ given to any clearly applicable law, regulation or written guideline that has been adopted ~~in state of by the~~ destination. ~~state~~. However, except in the case of the definition of what constitutes "tangible personal property", ~~this state,~~ a Supporting State is not required by this Statement to follow any other state's (including the destination state's) law, regulation or written guideline ~~should this state determine if it determines~~ that to do so (i) would conflict with its own laws, regulations, or written guidelines and (ii) would not clearly reflect the income-producing activity of the ~~company business~~ within ~~this state,~~ its borders.

Notwithstanding any provision set forth in this Statement to the contrary, ~~as between this state and any other signatory state, this state agrees to apply the~~ each Supporting State will apply the destination state's definition of "tangible personal property" ~~that exists in the state of destination~~ to determine the application of P.L. 86-272 ~~and issues of as it relates to the origin state's~~ throwback rule, if any. ~~Should If the state of destination not have any applicable state lacks a definition of such term so that it could be reasonably determined that would enable a determination of whether the property at issue constitutes sale in question is a sale of "tangible personal property", then each signatory state may treat such property the sale in any manner that would clearly reflect the income-producing activity of the company business within said state its borders.~~

VII

MISCELLANEOUS PRACTICES

A. APPLICATION OF STATEMENT TO FOREIGN COMMERCE.

Congress explicitly applied P.L. 86-272 only specifically applies, by its terms, to "interstate commerce" and. Therefore, by its terms, the statute does not ~~directly~~ apply to foreign commerce. The states are free See Border Pipe Line Co. v. Fed. Power Comm'n, 171 F.2d 149 (D.C. Cir. 1948) (explaining that Congress may choose to protect or regulate interstate but not foreign commerce). States, however, may elect to apply the same standards set forth P.L. 86-272 in the

~~Public Law and~~ context of foreign commerce. If a Supporting State applies P.L. 86-272 in this Statement to ~~business the~~ context of foreign commerce, it will do so consistently whether it is determining if activities in foreign commerce to ensure that foreign and interstate commerce are treated on the same basis. Such an application also avoids the necessity of expensive and difficult efforts in the identification and application of the varied jurisdictional laws and rules existing in foreign countries.

This state will apply the provisions of Public Law 86-272 and of this Statement to business activities conducted in foreign commerce. Therefore, whether business activities are conducted by (i) a foreign or domestic company selling tangible personal property into a country outside of the United States from a point within this state or by (ii) either company selling such property into this state from a point outside of the United States, the principles under this Statement apply equally to determine whether the sales transactions a foreign seller are protected and the company immune from taxation in either this state or in the foreign country, as the case might be, and whether, if applicable, this state will apply its throwback provisions or whether it is determining if sales into the foreign jurisdiction will be thrown back.

B. APPLICATION TO CORPORATION INCORPORATED IN STATE OR TO PERSON RESIDENT OR DOMICILED IN STATE.

The protection afforded by P.L. 86-272 ~~and the provisions of this Statement do not~~ does not apply to ~~anya~~ corporation incorporated ~~within this~~ under the laws of the taxing state or to ~~anya~~ person who is a resident of or domiciled in ~~this~~ the taxing state.

C. REGISTRATION OR QUALIFICATION TO DO BUSINESS.

~~A company that registers or otherwise formally qualifies~~

Merely registering or qualifying to do business within ~~this~~ a state ~~does, without more, will not, by that fact alone, lose its~~ forfeit the protection that may otherwise apply under P.L. 86-272. ~~Where, separate from or ancillary to such registration or qualification, the company receives and seeks in that state. Seeking to use or protect any additional benefit or protection from this under state law through engaging in other activity not otherwise protected under P.L. 86-272 or this Statement, (such as protecting a trade secret or corporate name) will forfeit the protection shall be removed.~~

D. LOSS OF PROTECTION FOR CONDUCTING UNPROTECTED ACTIVITY DURING PART OF TAX YEAR.

The protection afforded ~~under by~~ P.L. 86-272 ~~and the provisions of this Statement shall be~~ is determined on a tax year by tax year basis. Therefore, if at any time during a tax year ~~the company a~~ business conducts activities that are not protected under P.L. 86-272 ~~or this Statement, no sales in this state or income earned by the company attributed to this state during any part of said tax year shall be protected from taxation under said Public Law or this Statement, the business will not be considered protected under P.L. 86-272 for the entirety of that year.~~

APPLICATION OF THE JOYCE RULE:

E.

~~In determining whether the activities of any company have been conducted within this state beyond the protection of P.L. 86-272 or paragraph IV.B. of this Statement, the principle established in *Appeal of Joyce, Inc.*, Cal. St. Bd. of Equal. (11/23/66), commonly known as the "Joyce Rule", shall apply. Therefore, only those in-state activities that are conducted by or on behalf of said company shall be considered for this purpose. Activities that are conducted by any other person or business entity, whether or not said person or business entity is affiliated with said company, shall not be considered attributable to said company, unless such other person or business entity was acting in a representative capacity on behalf of said company.~~

Addendum: I

Public Law 86-272

Addendum II

MTC Factor Presence Nexus Standard for Business Activity Taxes